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IN THE

SUPREME COURT OF THE UNITED STATES

No. 73-89

SIEGFRIED WACHTEL and Wife ROBERTA S. WACHTEL,
Petitioners,

vs.

BRICE WEST and Wife FRANCES WEST,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

**To the United States Court of Appeals
for the Sixth Circuit**

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To the United States Court of Appeals for the Sixth Circuit

Siegfried Wachtel and wife, Roberta S. Wachtel, your Petitioners, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above captioned cause on April 11, 1973, and issued as a mandate on June 18, 1973.

OPINIONS BELOW

The opinions of the United States Court of Appeals for the Sixth Circuit and of the United States District Court for the Eastern District of Tennessee are attached hereto as an Appendix. The opinion of the Sixth Circuit was reported in 4 CCH Consumer Credit Guide 88,836, ¶ 99,036.

The opinion of the United States District Court for the Eastern District of Tennessee was reported at 344 Fed. Supp. 680.

JURISDICTION

This petition for certiorari is predicated upon 28 USC § 1254(1).

QUESTIONS PRESENTED

The sole question in this case is whether a suit seeking both of the remedies granted to a borrower by the Truth-in-Lending Act (Public Law 90-321, codified as Chapter 41 of Title 15 of the United States Code, §§ 1601 *et seq.* and hereinafter "the Act"), namely the civil penalties under § 140 of the Act and the assistance of the United States District Court in the enforcement of rescission under § 125 of the Act, is barred by the one year limitation provisions of § 130 of the Act when the suit is brought more than one year after funds were advanced pursuant to a loan subject to the Act, but before the lender made the disclosures required by § 121 of the Act.

STATUTORY PROVISIONS INVOLVED

The pertinent statutory provisions are Sections 121, 125, 129 and 130 of Public Law 90-321, Title I, c. 2, codified as Sections 1631, 1635, 1639 and 1640, respectively, of Title 15 of the United States Code. These sections are set forth verbatim as appendix C.

STATEMENT OF THE CASE

The Petitioners, Siegfried Wachtel and wife, Roberta S. Wachtel, filed a Complaint on April 25, 1972, in the United States District Court for the Eastern District of Tennessee basing jurisdiction on § 130 of the Truth-in-Lending Act and alleging that the Respondents loaned to the Petition-

ers the sum of Two Thousand Nine Hundred Fifty Dollars ($2,950.00) and took as security therefor a security interest in real property expected at the time of the loan to be used as the residence of the Petitioners. The instruments evidencing the transaction were executed and the funds advanced on October 28, 1970, but the Complaint alleges (and the Respondents' Motion to Dismiss does not deny) that the disclosures required by the Act, and specifically by § 121 thereof, were never made by the Respondents to the Petitioners. The disclosures required by § 121 of the Act relate to certain financial information. [In addition, § 125 of the Act requires that the lender disclose to the borrower that the borrower has a right to rescind the entire transaction as provided therein and further requires that the borrower be given an adequate opportunity to exercise that right.]

The Complaint then alleges that, the required disclosures not having been made, the Petitioners undertook to exercise the right to rescind conferred by § 125 of the Act on April 11, 1972, and that the Respondents, subsequent to receiving notice of rescission, took steps inconsistent with rescission and predicated upon the assumption that rescission was not effective.

In response to the Complaint the Respondents filed a Motion to Dismiss contending that the one-year limitation period of § 140(e) of the Act barred the cause of action. This motion was sustained by the District Court. The District Judge noted in his memorandum opinion that § 130 of the Act required that any suit based upon that section be brought within one year after the occurrence of any violation under the Act. He then held that, in the absence of a clear statutory definition, "a violation" of the Act shall be deemed to occur at the time a loan transaction is consummated and by implication not thereafter. The District Judge therefore sustained Respondents' motion and dismissed the suit at the cost of the Petitioners.

The Court of Appeals for the Sixth Circuit affirmed the judgment of the District Court, one judge dissenting. In its opinion, the Court of Appeals held, first, that the remedies granted under § 130 of the Act were available for a period of no more than one year after the consummation of a loan transaction without regard to whether or not the disclosures required by the Act were made. Second, the Court of Appeals further stated "this case is not concerned with the right of rescission . . ."

This petition for certiorari follows the decision of the Court of Appeals.

Petitioners respectfully submit, pursuant to Rule 19 of the Rules of this Court, that first of all the instant case involves important questions of Federal Law which this Court has not yet specifically decided, namely the construction of the limitation provision of § 130 of the Act, and the question of whether federal courts are the proper forum for seeking enforcement of the rescission provisions of the Act; and, second, that the decision of the Court of Appeals for the Sixth Circuit conflicts not with the letter, but with the spirit of the recent decision of this Court in the case of **Mourning v. Family Publication Service, Inc.**, decided April 24, 1973, some two weeks after the decision of the Sixth Circuit Court of Appeals in the instant case.

A. The Monetary Remedies

The Petitioners respectfully submit, first, that the construction placed upon § 130 (e) of the Act by the Courts below is unwarranted by the clear, plain and unambiguous language of the statute. Clearly, § 125 of the Act contemplates that disclosure may occur after consummation:

> "(a) Except as otherwise provided in this section, in the case of any consumer credit transaction in which a security interest is retained or acquired in

any real property which is used or is expected to be used as the residence of the person to whom credit is extended, the obligor shall have **the right to rescind** the transaction **until midnight of the third business day following the consummation of the transaction or the delivery of the disclosures required** under this section and all other material disclosures required under this part, **whichever is later** by notifying the creditor, in accordance with regulations of the Board of his intention to do so. **The creditor shall clearly and conspicuously disclose,** in accordance with regulations of the Board, to any obligor in a transaction subject to this section **the rights of the obligor under this section. The creditor shall also provide,** in accordance with regulations of the Board, an **adequate opportunity to the obligor to exercise his right to rescind** any transaction subject to this section. [Emphasis supplied.] 15 U.S.C. § 1635.

To hold that a violation of the Act can occur only at the time of the consummation of the loan is to ignore the quintessential requirement of disclosure, and to ignore the statutory language emphasized. This in turn, violates the hornbook canon of statutory construction, forbidding that a statute be construed so as to make statutory language surplusage, absent a logical mandate to the contrary. Here, no sound reason compels the construction placed upon the section in question by the courts below. Rather, Petitioners respectfully submit that logic, as well as policy, lead to a contrary construction, and that the one-year limitation of § 130 (e) commences to run only after the disclosures compelled by the Act are made, whether made at the time the transaction is consummated, or thereafter.

The intent and spirit of the Truth-in-Lending Act, after having been limned by District Courts, and Courts of Appeal, was unequivocally enunciated by this Court in **Mourning:**

> "The Truth-in-Lending Act reflects a transition in congressional policy from a philosophy of let-the-buyer-beware to one of let-the-seller-disclose."

Petitioners respectfully urge that to permit the decision of the Court of Appeals in this case to stand is to turn back the clock to the days of *caveat emptor*. Under the decisions below, a lender would be able to withhold the disclosures clearly mandated by the Act in the knowledge that his defiance of the disclosure requirements under the worst possible circumstances would result in a civil penalty limited to One Thousand Dollars ($1,000.00) and attorney's fees. On the other hand, should the borrower prove sufficiently unsophisticated and not become aware of his rights under the Act for a period of one year, the lender will have the full benefit not only of any unconscionable bargain he may have made, but of having flaunted the clear requirements of the Act. Such a result, Petitioners submit, is clearly contrary to the philosophy and purposes of the Act both as expressed in the Act itself and as expressed in the **Mourning** case by this Court.

That the clear and unequivocal purpose of the Act is to require disclosure has been almost universally recognized by the courts which have construed the Act. E.g., **Mourning v. Family Publication Service, Inc.**, *supra*; and **Ratner v. Chemical Bank New York Trust Company**, 329 F. Supp. 270 (S.D.N.Y.) (1971), *inter alia*. That the Court should now say that the refusal or failure of a lender to disclose, which dereliction is clearly proscribed by the Act, will be ignored if only the borrower is sufficiently unsophisticated or untutored to be aware of his rights under the Act, in effect is not only to avoid the mandate of the Act itself as an expression of congressional intent but also to overlook the clear concurrence by the courts in the purposes of the Act.

Indeed, one of the most important provisions of the Act is its requirement that the lender disclose to a borrower

not only the credit terms (§§ 121, 129) but also the availability of the remedy of rescission (§ 125). The opinions of the lower courts in the case at bar reverse the thrust of the Act, in that, rather than burdening the lender with the obligation of disclosure on the matter of rescission, they impose upon the borrower the obligation to be diligent and discover what rights he has under the Act, even though he may never have heard of the Act. Such a position, Petitioners respectfully submit, not only is an unconscionable distortion of the clear objectives of the Act, and of the great body of the cases under the Act, but flies in the face of the well-recognized legal maxim that a party will not be obligated to be diligent in the enforcement of rights of which he was not aware.

Finally, to the extent that the lender feels that exposure to penalties and possible rescission for an indefinite period is unduly burdensome, there is one clear, easy, simple and direct way in which to start the limitations period of § 120 (e) running, and that is to make the disclosures, specifically including the disclosure of the right of rescission, to the borrower. Petitioners are frankly at a loss to understand the lower Courts' construction of this legislation which is aimed at remedying credit abuses and providing some help to the borrower in overcoming the ever-present disparity in bargaining power between a lender and a borrower. The opinions below have the effect, clearly not intended by Congress, of benefiting the violator of the Act who, by virtue of his superior economic position, has access to more sophisticated counsel and so is more likely to be informed, at the expense of the intended beneficiary of the Act, who, again by virtue of his economically inferior position, is much less likely to have adequate counsel at the time of the consummation of the transaction which gives rise to the potential liability. Indeed, often lacking the financial resources to retain counsel at the time the loan is made, the borrower is very likely not even

to know that the Act exists, and invests him with certain rights. The disclosure provisions would seem to be intended at remedying this lack of sophistication. And yet, under the rulings below, if the lender can just manage to keep the borrower in the dark long enough, the lender is home free.

B. The Rescission Remedy

A point which was not treated at all by the District Court in its opinion, and which Petitioners submit was incorrectly treated by the Court of Appeals in its opinion, is the matter of rescission. Even if it is assumed, *arguendo*, that the one-year limitation period does apply to the civil remedies provided by § 130 of the Act, nevertheless the only logical reading of that part of § 125 of the Act granting the remedy of rescission is that no limitation period commences to run until the required disclosures are made. And indeed, the Federal Reserve Board has taken this position in two letters from attorneys for the Federal Reserve Board to inquiring parties, as reported in the Commerce Clearing House Consumer Credit Guide, Volume I, at Paragraphs 30,217 and 30,245.

> "If the right of rescission is applicable, and the creditor fails to give the required notice, it would be a violation of the Act subjecting the creditor to potential civil and criminal liability. In addition, the right of rescission continues throughout the duration of the loan; **it is not subject to a statute of limitations.**" [Emphasis supplied.] 4 CCH Consumer Credit Guide 66,098, ¶ 30,217.

> "We agree that the statute of limitations in § 130 of the Act has no applicability to the right of rescission. As you know, § 226.9(a) of the Regulation [FRB Regulation Z] states that 'the consumer shall have the right to rescind that transaction until mid-

night of the third business day following the date of consummation of that transaction **or** the date of the delivery of the disclosures required under this section **and** all other material disclosures required under this part **whichever is later** . . .' Presumably under the present wording of the law if disclosures are not made or the notice of rescission is not given, the right of rescission would run indefinitely.

'You further suggest that if the proper disclosures are not made prior to consummation of the transaction there is no way to subsequently make disclosures which will start the rescission period running. It is our opinion that while delivery of disclosures after consummation may give rise to civil and criminal liability under the Act, it will not prevent the running of the rescission period. If a creditor gives the appropriate disclosures in a rescindable transaction after consummation, the rescission period will run from the date of delivery of the disclosures and notice of rescission." 4 CCH Consumer Credit Guide 66,111, ¶ 30,245.

The statement of the Court of Appeals, to the effect that "this case is not concerned with the right of rescission" is indeed puzzling to Petitioners. As that opinion clearly notes, the prayer for relief in the Complaint was threefold. The first prayer was for the damages allowed under § 120 of the Act. The Complaint had alleged that notice had been given by Petitioners to Respondents of Petitioners' exercise of the option to rescind the transaction as permitted by § 125 of the Act and that Respondents had in effect ignored the rescission notice. Therefore, the second prayer of the Complaint was for a preliminary injunction, pending the hearing, to restrain Respondents from attempting to enforce any remedy against the Petitioners based upon the second mortgage, which Petitioners allege (and which Respondents have not denied), was rescinded.

Finally, the Complaint sought to make the preliminary injunction permanent, and for a declaration by the Court affirming the rescission. Petitioners would, therefore, most respectfully submit that the Court of Appeals apparently overlooked the clear request of the Petitioners for relief under the rescission provisions of the Act, in addition to the claim for civil penalties under § 130.

By the terms of § 125 of the Act, and § 226.9 of Regulation Z of the Federal Reserve Board, promulgated pursuant to the Act, the only apparent requirement to effect rescission is the giving of notice, and nothing further.

However, the uncontroverted allegations of the Complaint are to the effect that the Respondents have, *sua sponte,* refused to honor Petitioner's notice of rescission. The Court of Appeals, in addition to somehow overlooking the rescission aspect of the Complaint, also questions the jurisdiction of the District Court in the rescission matter. To what Court, then, shall Petitioners and those in like circumstances turn when lenders unilaterally ignore the clear provisions and requirements of the Act? Under the opinion of the Court of Appeals, and of the District Court, Petitioners are apparently relegated to the cold comfort of being right, but of not being able to do anything about it.

The Court of Appeals in its opinion also noted that one District Court had required an election of remedies in facts somewhat similar to the case at bar, citing **Bostwick v. Cohen,** 319 F. Supp. 875 (N.D. Ohio 1970). However, in the instant case, the matter of election of remedies was never raised in the case until the opinion of the Court of Appeals. Petitioners respectfully suggest that to impose such an election on Petitioners unilaterally is unjust.

Finally, Petitioners submit that, unquestionably the effect of the opinions, both of the District Court and of the Court of Appeals, is to impose a one-year limitation on the right

of rescission, notwithstanding the clear mandate of the Act. Petitioners urge that the position of the legal staff of the Federal Reserve Board, set forth above, is clearly the sounder approach.

SUMMARY

In summary, Petitioners respectfully insist that the opinions of the Court of Appeals for the Sixth Circuit, and of the District Court for the Eastern District of Tennessee are both clearly contrary to the spirit and intent of the Truth-in-Lending Act, in that both opinions permit a lender either negligently or unscrupulously to refuse or fail to make the disclosures required by that Act, and so long as the borrower can be kept ignorant of the Act for a period of one year, the lender need not comply with the Act. Surely, the disclosure requirements serve the purpose of informing the borrower what he is getting into, and surely the failure or refusal to observe the requirements of the Act as to disclosure will not be protected by the lapse of a year, in view of the fact that disclosure *per se* will insulate against any undue delay in enforcement of remedies by the borrower under the Act.

Additionally, Petitioners respectfully insist that they are entitled to the assistance of federal courts in compelling Respondents to recognize and honor the rescission provisions of the Truth-in-Lending Act, and that such provisions are in any event not governed by § 130 (e) of the Act, but by their own terms, and that the period within which rescission may be effected expires only after disclosure.

Wherefore, the Petitioners respectfully pray that this Honorable Court grant their Petition for Certiorari in this cause, to review the decision and opinion of the Court of Appeals for the Sixth Circuit, and that upon the grant-

ing of such Petition, this Honorable Court reverse the decision of that Court, and of the District Court in this cause, and remand the cause to the Court of Appeals, for subsequent remand to the District Court, to permit the Respondents to answer, in order that the cause may be heard on the merits.

Respectfully submitted

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APPENDIX

APPENDIX A

No. 72-1800

United States Court of Appeals
For the Sixth Circuit

Siegfried Wachtel and Wife, Roberta S. Wachtel,
Plaintiffs-Appellants,
v.
Bryce West and Wife, Frances West,
Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Tennessee.

Decided and Filed April 11, 1973.

Before: Phillips, Chief Judge; Lively, Circuit Judge, and Young, District Judge.*

Lively, Circuit Judge. This case concerns the Truth in Lending Act of 1968, 82 Stat. 146, 15 U.S.C., § 1601, et seq. More specifically involved is a portion of the Act codified as 15 U.S.C., § 1640, which provides civil liability for failure to make any of the disclosures required by the Act. Subsection (e) of Section 1640 is as follows:

> (e) Any action under this section may be brought in any United States district court, or in any other court of competent jurisdiction, within one year from the date of the occurrence of the violation.

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* The Honorable Don J. Young, District Judge of the United States District Court for the Northern District of Ohio, sitting by designation.

Appellants filed this action in the district court, asserting that jurisdiction was based on Title 15, U.S.C., Section 1640. The complaint alleged that the plaintiffs had borrowed money from the defendants on October 28, 1970, giving a second mortgage on their residence as security. It further alleged that the defendants failed to make the disclosures to them that are required by 15 U.S.C., § 1631.[1] In a separate paragraph the plaintiffs stated that they had notified the defendants of their intention to rescind the mortgage transaction for failure to make the required disclosures but that the defendants had taken actions inconsistent with rescission. The prayer for relief was three-fold:

(1) . . . for the damages permitted and described in title 15, U.S.C., § 1640, together with their costs and a reasonable attorney's fee in the cause;

(2) for a preliminary injunction to restrain the defendants from enforcing any remedy against the plaintiffs upon the second mortgage; and

(3) that the court declare the mortgage void and the preliminary injunction be made permanent.

The complaint was filed on April 25, 1972, and the defendants filed a timely motion to dismiss for failure to bring the action within one year of the accrual of the claim stated. The district court granted the motion and entered a judgment dismissing the action on its merits. The opinion of Judge Neese appears at 344 F. Supp. 680 (E.D. Tenn. 1972).

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[1] **§ 1631. General requirement of disclosure**

(a) Each creditor shall disclose clearly and conspicuously, in accordance with the regulations of the Board, to each person to whom consumer credit is extended and upon whom a finance charge is or may be imposed, the information required under this part.

(b) If there is more than one obligor, a creditor need not furnish a statement of information required under this part to more than one of them.

The narrow question presented on appeal is whether a violation of the duty to disclose information to a borrower occurs at the time such disclosure is first required to be made, or whether it is a continuing violation until such time as the disclosure is actually made. In order to decide this question we must examine the overall purpose of the Act as well as the particular sections referred to in the complaint.

The purpose of Congress in enacting the Truth in Lending Act is set forth in 15 U.S.C., § 1601, as follows:

> **§ 1601. Congressional findings and declaration of purpose**
>
> The Congress finds that economic stabilization would be enhanced and the competition among the various financial institutions and other firms engaged in the extension of consumer credit would be strengthened by the informed use of credit. The informed use of credit results from an awareness of the cost thereof by consumers. It is the purpose of this subchapter to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit.

Pursuant to § 1604 the Board of Governors of the Federal Reserve System issued its Regulation Z (12 CFR, § 226 (1969)), which provides in part, as follows:

> REGULATION Z
>
> PART 226—TRUTH IN LENDING
>
> **§ 226.1. Authority, scope, purpose, etc.**
>
> (a) **Authority, scope, and purpose.** (1) This part comprises the regulations issued by the Board of Governors of the Federal Reserve System pursuant to title I (Truth in Lending Act) and title V (General Pro-

visions) of the Consumer Credit Protection Act, as amended (15 U. S. C., Section 1601 et seq.). Except as otherwise provided herein, this part applies to all persons who in the ordinary course of business regularly extend, or offer to extend, or arrange, or offer to arrange, for the extension of consumer credit as defined in paragraph (k) of § 226.2 and to all persons who issue credit cards.

(2) This part implements the Act, the purpose of which is to assure that every customer who has need for consumer credit is given meaningful information with respect to the cost of that credit which, in most cases, must be expressed in the dollar amount of finance charge, and as an annual percentage rate computed on the unpaid balance of the amount financed. Other relevant credit information must also be disclosed so that the customer may readily compare the various credit terms available to him from different sources and avoid the uniformed use of credit. This part also implements the provision of the Act under which a customer has a right in certain circumstances to cancel a credit transaction which involves a lien on his residence. Advertising of consumer credit terms must comply with specific requirements, and certain credit terms may not be advertised unless the creditor usually and customarily extends such terms. This part also contains prohibitions against the issuance of unsolicited credit cards and limits on the cardholder's liability for unauthorized use of a credit card. Neither the Act nor this part is intended to control charges for consumer credit, or interfere with trade practices except to the extent that such practices may be inconsistent with the purpose of the Act.

The purpose of disclosure is clearly to give the borrower an opportunity to do some comparative shopping for credit terms. In the words of Congressman Helstoski, the Act

affords the consumer an opportunity to ascertain which offer (of credit terms) ". . . is best in terms of dollars and to obtain a better 'buy'." 114 Congressional Record 1614 (Permanent Ed. Jan. 31, 1968). See **Ratner v. Chemical Bank of New York Trust Co.**, 329 F. Supp. 270, 276 (S.D. N.Y. 1971); **Bisette v. Colonial Mortgage Corporation**, 340 F. Supp. 1191 (D.D.C. 1972).

Though the Act is primarily concerned with sales of personal property involving consumer financing, credit card purchases and open-end credit, it also applies to real estate transactions, and special consideration is given to a very limited type of real estate credit transaction. Under 15 U.S.C. § 1635 a right of rescission is given to a borrower to whom credit is extended in a transaction where a security interest (other than a first lien to finance acquisition) is created or retained on real estate used or expected to be used as the principal residence of the obligor. This right does not depend on any wrongdoing by the lender, but may be exercised by the borrower for any reason so long as he acts within the prescribed time and follows the prescribed procedure. He (the borrower) may rescind this type transaction at any time until midnight of the third business day following consummation of the transaction, or the delivery of the required disclosures, "whichever is later." Section 226.9 of Regulation Z contains detailed rules which are designed to compel notification to the borrower of his right to rescind and which require a delay in closing the credit transaction until the recission period has passed.

Taking the allegations of the complaint as true, it appears that the appellees have violated the provisions of the Act and of Regulation Z. Because the right of rescission exists until the end of the third business day, or until disclosure, whichever is later, and it is alleged that no disclosure has ever been made, it may be that this remedy is still available to the appellants. The Act does not contain a statute of

limitations for enforcement of the right to rescind. However, since rescission is an equitable remedy, presumably the defenses of laches or estoppel could be interposed to prevent a borrower from enjoying the benefit of the credit for a long period of time and then succeeding in having the transaction avoided to the detriment of the lender. It should be noted that the Act does not specifically provide that federal courts have jurisdiction of actions for rescission.

The appellant has attempted to engraft the "whichever is later" provision of § 1635 onto this action for damages under § 1640. However, this case is not concerned with the right of rescission, and at least one court has held that the two remedies are inconsistent, so that the election to proceed under one theory constitutes an abandonment of the other. **Bostwick v. Cohen,** 319 F. Supp. 875 (N.D. Ohio 1970). Here the complaint premised jurisdiction on § 1640, which provides for damages for failure to disclose the information set forth in the Act and specifically, on subsection (e), which confers jurisdiction upon United States district courts, together with other courts of competent jurisdiction. The same subsection requires an action under "this section" to be brought within one year from the date of the occurrence of the violation. We must determine when the violation occurs in a case where the required disclosures are not made.

The stated purpose of the Act is to enable the consumer "to compare more readily the various credit terms available to him and avoid the uninformed use of credit." 15 U.S.C. § 1601. In order to make the oportunity for comparison meaningful, the borrower must have the required information in his possession before he becomes committed to any particular lender. This is expressed in § 1639(b), which provides:

Form and timing of disclosure

(b) Except as otherwise provided in this part, the disclosures required by subsection (a) of this section shall be made **before the credit is extended,** and may be made by disclosing the information in the note or other evidence of indebtedness to be signed by the obligor. (emphasis added)

The Act does not define the term [When] "the credit is extended," prior to which time it requires disclosures to be made. However, Regulation Z, § 226.2 (cc) is helpful in this respect. It reads as follows:

(cc) A transaction shall be considered consummated at the time a contractual relationship is created between a creditor and a customer irrespective of the time of performance of either party.

It thus appears that a credit transaction which requires disclosures under the Act is completed when the lender and borrower contract for the extension of credit. The disclosures must be made sometime before this event occurs. If the disclosures are not made, this violation of the Act occurs, at the latest, when the parties perform their contract. The provisions with respect to the right of rescission seem to contemplate a continuing violation when the disclosures are not made, but such is not the case when damages are sought. In the present case performance of the contract and violation of the disclosure requirement took place on October 28, 1970, and the one-year statute of limitations began to run on that date. This action, filed one year five months and 28 days later, was barred.

The judgment is affirmed.

Young, District Judge, Dissenting.

I respectfully dissent. The statute states:

It is the purpose of this title . . . to assure a meaningful disclosure of credit terms so that the consumer will be

> able to compare more readily the various credit terms available to him and avoid the uninformed use of credit. 15 U.S.C. § 1601.

Congress, to effectuate this end, requires that a creditor make certain disclosures to the consumer. 15 U.S.C. §§ 1632-39. If the disclosures are not made, there are civil sanctions which may be imposed on the creditor, 15 U.S.C. § 1640, but the "action under this section may be brought . . . within one year from the date of the occurrence of the violation." 15 U.S.C. § 1640(e). The statute also gives the consumer the right to rescission, 15 U.S.C. § 1635, as explained in the majority opinion.

The majority holds that the rescission remedy provides sufficient protection for the consumer so that the violation as mentioned in § 1640(e) occurs at the time the parties entered into the agreement and the statute of limitations begins to run at that time. If the statute is to be interpreted as the majority have construed it, its effectiveness is limited. It is not difficult to imagine a situation where a consumer has entered into an agreement with a creditor which requires repayment of a loan over a period of five years or more. The creditor does not make disclosures as required by the Act and the consumer is an uninformed one whom the Act was designed to protect. The terms of the agreement are such that the offensive part of the financing does not evidence itself in the loan repayment schedule until after the first year. Under the majority opinion, the consumer will not be able to sue for damages when he becomes aware of the offensive financing since the statute of limitations has run. The consumer at this point is left with the rescission remedy only. Assuming a successful suit by the consumer, it still provides little deterrent effect for the creditor who chose not to disclose since the parties are merely returned to their original positions. In other words, if no disclosures are made the creditor need only fear that the contract may be rescinded but he need not fear any civil liability.

To protect the creditor from civil liability in these situations is to take much of the effectiveness out of the statute, since a creditor who chose not to make disclosures to an uninformed consumer would only have to delay the operation of an offensive part of the agreement until one year after the parties entered into it.

As a general rule, statutes of limitations in actions for fraud commence to run at the time when the fraud is discovered, not when the fraudulent acts occurred. Basically, the statute involved here is designed to prevent frauds being perpetrated by sophisticated lenders upon uninformed borrowers. It would therefore appear that these general principles should be applied to the limitation period in the statute here involved. If the limitation of the statute is thus construed, the "violation" occurs when the consumer knows or should know of the undisclosed credit terms. This would make the knowledge of the violation a factual matter. For example, in the hypothetical situation posed above, the consumer knew or should have known of the violation the moment the offensive financing arrangement surfaced in the loan repayment schedule. Under my construction of the Act, the consumer then has one year from this point in time to initiate his action. Obviously, the creditor has it within his power to avoid any liability under the statute by making disclosures as required by law prior to entering into the agreement.

I would hold that the one year limitation did not commence to run until the plaintiffs discovered the defendants' violation of the statute and made the demand for rescission which was refused by the defendants. If, as the majority suggests, there was at that time a requirement to elect between the legal and equitable remedies, the plaintiffs made that election by commencing this action, which was done well within the statutory one year limitation after plaintiffs discovered the violation of their rights under the Act. The judgment of the District Court should be reversed, and the case remanded.

APPENDIX B

In the United States District Court for the
Eastern District of Tennessee
Winchester Division

Siegfried Wachtel, Et Ux.,
Plaintiffs,
v.
Bryce West, Et Ux.,
Defendants.
Civil Action
No. 1115

MEMORANDUM OPINION

(Filed June 15, 1972)

This is an action of first impression, by which the plaintiffs Mr. and Mrs. Wachtel seek money damages from the defendants Mr. and Mrs. West under the Truth-in-Lending Act. 15 U. S. C. §§ 1601, et seq. The defendants have moved to dismiss the action for failure to state a claim on which relief can be granted, Rule 12 (b) (6), Federal Rules of Civil Procedure, in that the action is barred by the applicable statute of limitation. 15 U. S. C. § 1640 (e).

The facts, as they appear from the pleadings, are that Mr. and Mrs. Wachtel borrowed money on consumer credit from Mr. and Mrs. West on October 28, 1970; and that such creditors failed to make the disclosures required by 15 U. S. C. § 1631 (a) at the time of the loan transaction and had not done so when this action was commenced. It is patent that 15 U. S. C. § 1640 (e) limits actions for the damages provided for under 15 U. S. C. § 1640, which may be brought in a United States district court or other court of competent jurisdiction, to "* * * one year from

the date of the occurrence of the violation." Mr. and Mrs. Wachtel claim that the defendants' failure to disclose under the Truth-in-Lending Act is a continuing violation thereof, and that the aforementioned one-year period did not begin to run until the borrowers notified the creditors of their (the borrowers') intention to rescind the loan agreement.

There is nothing in the Truth-in-Lending Act or its legislative history, U. S. Code Congressional and Administrative News, 90th Congress, 2d Session (1968), pp. 1962, et seq., which specifically defines the point at which such "violation" thereunder occurs. However, the Act itself appears to contemplate that "a violation" occurs at the moment a loan transaction is consummated; accordingly, that the limitation of 15 U. S. C. § 1640 (e) commences to run at that moment. As has been observed:

> * * * [T]he Act requires that 'each creditor shall disclose clearly and conspicuously, in accordance with the regulations of the Board, to each person to whom consumer credit is extended and upon whom a finance charge is or may be imposed, the information required under this part.' 15 U. S. C. § 1631 (a). For failure in connection with any consumer credit transaction to disclose to any person information required by 15 U. S. C. 1638 (a), the Truth-in-Lending Act imposes on such creditor civil liability, 15 U. S. C. § 1640 * * *.

Mourning v. Family Publications Service, Inc., C. A. 5th (1971), 449 F. (2d) 235, 240. It is the opinion of this Court that the violation which gives rise to the cause of action *sub judice* occurred on October 28, 1970, the date Mr. and Mrs. West extended consumer credit to Mr. and Mrs. Wachtel, and on which date such creditors failed to disclose clearly and conspicuously, in accordance with the pertinent regulations, the information required under the Act.

"* * * [A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. * * *" **Conley v. Gibson** (1957), 355 U. S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. (2d) 80, 84 [4]. It is undisputed that the consumer credit involved was extended on October 28, 1970. This action was commenced, as this Court judicially notices, on April 25, 1972. This was obviously one year, five months, and 28 days after the violation of the Truth-in-Lending Act by Mr. and Mrs. West occurred. It thus appears beyond doubt that Mr. and Mrs. Wachtel can prove no set of facts in support of their claim against Mr. and Mrs. West which would entitle the plaintiffs to relief.

Having such view of the matter, this Court here by GRANTS the defendants' motion of May 16, 1972, and the plaintiffs hereby are DENIED all relief. Rule 58 (1), Federal Rules of Civil Procedure.

File:

(C. G. Neese)
United States District Judge

For publication.

APPENDIX C

1631. General requirement of disclosure.—(a) Each creditor shall disclose clearly and conspicuously, in accordance with the regulations of the Board, to each person to whom consumer credit is extended and upon whom a finance charge is or may be imposed, the information required under this chapter [§§ 1631-1644 of this title].

(b) If there is more than one obligor, a creditor need not furnish a statement of information required under this chapter [§§ 1631-1644 of this title] to more than one of them. (May 29, 1968, P. L. 90-321, Title I, c. 2, § 121, 82 Stat. 152.)

1635. Right of rescission as to certain transactions.—(a) Except as otherwise provided in this section, in the case of any consumer credit transaction in which a security interest is retained or acquired in any real property which is used or is expected to be used as the residence of the person to whom credit is extended, the obligor shall have the right to rescind the transaction until midnight of the third business day following the consummation of the transaction or the delivery of the disclosures required under this section and all other material disclosures required under this chapter [§§ 1631-1644 of this title], whichever is later, by notifying the creditor, in accordance with regulations of the Board, of his intention to do so. The creditor shall clearly and conspicuously disclose, in accordance with regulations of the Board, to any obligor in a transaction subject to this section the rights of the obligor under this section. The creditor shall also provide, in accordance with regulations of the Board, an adequate opportunity to the obligor to exercise his right to rescind any transaction subject to this section.

(b) When an obligor exercises his right to rescind under subsection (a), he is not liable for any finance or other

charge, and any security interest given by the obligor becomes void upon such a rescission. Within ten days after receipt of a notice of rescission, the creditor shall return to the obligor any money or property given as earnest money, downpayment, or otherwise, and shall take any action necessary or appropriate to reflect the termination of any security interest created under the transaction. If the creditor has delivered any property to the obligor, the obligor may retain possession of it. Upon the performance of the creditor's obligations under this section, the obligor shall tender the property to the creditor, except that if return of the property in kind would be impracticable or inequitable, the obligor shall tender its reasonable value. Tender shall be made at the location of the property or at the residence of the obligor, at the option of the obligor. If the creditor does not take possession of the property within ten days after tender by the obligor, ownership of the property vests in the obligor within obligation on his part to pay for it.

(c) Notwithstanding any rule of evidence, written acknowledgment of receipt of any disclosures required under this title [§§ 1601 and note-1613, 1631-1644, 1661-1665 of this title] by a person to whom a statement is required to be given pursuant to this section does no more than create a rebuttable presumption of delivery thereof.

(d) The Board may, if it finds that such action is necessary in order to permit homeowners to meet bona fide personal financial emergencies, prescribe regulations authorizing the modification or waiver of any rights created under this section to the extent and under the circumstances set forth in those regulations.

(e) This section does not apply to the creation or retention of a first lien against a dwelling to finance the acquisition of that dwelling. (May 29, 1968, P. L. 30-321, Title I, c. 2, § 125, 82 Stat. 152.)

1639. Consumer loans not under open end credit plans.— (a) Any creditor making a consumer loan or otherwise extending consumer credit in a transaction which is neither a consumer credit sale nor under an open end consumer credit plan shall disclose each of the following items, to the extent applicable:

(1) The amount of credit of which the obligor will have the actual use, or which is or will be paid to him or for his account or to another person on his behalf.

(2) All charges, individually itemized, which are included in the amount of credit extended but which are not part of the finance charge.

(3) The total amount to be financed (the sum of the amounts referred to in paragraph (1) plus the amounts referred to in paragraph (2)).

(4) Except in the case of a loan secured by a first lien on a dwelling and made to finance the purchase of that dwelling, the amount of the finance charge.

(5) The finance charge expressed as an annual percentage rate except in the case of a finance charge.

(A) which does not exceed $5 and is applicable to an extension of consumer credit not exceeding $75, or

(B) which does not exceed $7.50 and is applicable to an extension of consumer credit exceeding $75.

A creditor may not divide an extension of credit into two or more transactions to avoid the disclosure of an annual percentage rate pursuant to this paragraph.

(6) The number, amount, and the due dates or periods of payments scheduled to repay the indebtedness.

(7) The default, delinquency, or similar charges payable in the event of late payments.

(8) A description of any security interest held or to be retained or acquired by the creditor in connection with the

extension of credit, and a clear identification of the property to which the security interest relates.

(b) Except as otherwise provided in this chapter [§§ 1631-1644 of this title], the disclosures required by subsection (a) shall be made before the credit is extended, and may be made by disclosing the information in the note or other evidence of indebtedness to be signed by the obligor.

(c) If a creditor receives a request for an extension of credit by mail or telephone without personal solicitation and the terms of financing, including the annual percentage rate for representative amounts of credit, are set forth in the creditor's printed material distributed to the public, or in the contract of loan or other printed material delivered to the obligor, then the disclosures required under subsection (a) may be made at any time not later than the date the first payment is due. (May 29, 1968, P. L. 90-321, Title I, c. 2, § 129, 82 Stat. 156.)

1640. Civil Liability.—(a) Except as otherwise provided in this section, any creditor who fails in connection with any consumer credit transaction to disclose to any person any information required under this chapter [§§ 1631-1644 of this title] to be disclosed to that person is liable to that person in an amount equal to the sum of

(1) twice the amount of the finance charge in connection with the transaction, except that the liability under this paragraph shall not be less than $100 nor greater than $1,000; and

(2) in the case of any successful action to enforce the foregoing liability, the costs of the action together with a reasonable attorney's fee as determined by the court.

(b) A creditor has no liability under this section if within fifteen days after discovering an error, and prior to

the institution of an action under this section or the receipt of written notice of the error, the creditor notifies the person concerned of the error and makes whatever adjustments in the appropriate account are necessary to insure that the person will not be required to pay a finance charge in excess of the amount or percentage rate actually disclosed.

(c) A creditor may not be held liable in any action brought under this section for a violation of this chapter [§§ 1631-1644 of this title] if the creditor shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.

(d) Any action which may be brought under this section against the original creditor in any credit transaction involving a security interest in real property may be maintained against any subsequent assignee of the original creditor where the assignee, it subsidiaries, or affiliates were in a continuing business relationship with the original creditor either at the time the credit was extended or at the time of the assignment, unless the assignment was involuntary, or the assignee shows by a preponderance of evidence that it did not have reasonable grounds to believe that the original creditor was engaged in violations of this chapter [§§ 1631-1644 of this title], and that it maintained procedures reasonably adapted to apprise it of the existence of any such violations.

(e) Any action under this section may be brought in any United States district court, or in any other court of competent jurisdiction, within one year from the date of the occurrence of the violation (May 29, 1968. P. L. 90-321, Title I, c. 2, § 130, 82 Stat. 157.)

FILE COPY

Supreme Court, U.S.
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AUG 14 1973
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

No. 73-891

SIEGFRIED WACHTEL and Wife, ROBERTA S. WACHTEL,
Petitioners,

vs.

BRYCE WEST and Wife, FRANCES WEST,
Respondents.

REPLY TO
PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals for the Sixth Circuit

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IN THE

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SIEGFRIED WACHTEL and Wife, ROBERTA S. WACHTEL,
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BRYCE WEST and Wife, FRANCES WEST,
Respondents.

REPLY TO PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit

Bryce West and wife, Frances West, your respondents, files this their reply to the Petition for Writ of Certiorari heretofore filed to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above captioned cause on April 11, 1973, and issued as a mandate on June 18, 1973.

The respondents herein adopt as presented in petitioners' petition:

Opinions Below
Jurisdiction
Questions Presented
Statutory Provisions Involved
Appendix A
Appendix B
Appendix C

STATEMENT OF THE FACTS

On October 28, 1970, the Respondents conveyed to the Petitioners by general warranty deed a house and lot for a total consideration of Fourteen Thousand Five Hundred ($14,500.00) Dollars; the Petitioners had previously paid to the Respondents Three Hundred ($300.00) Dollars in cash as a down payment; the Petitioners secured a first mortgage loan from Home Federal Savings and Loan Association of Manchester, Tennessee, in the amount of Eleven Thousand Two Hundred Fifty Dollars ($11,250.00), repayable in monthly installments and bearing interest at eight and one-half (8½) per cent per annum, which was paid over to the Respondents; the security interest subject to this litigation was by the way of a deed of trust executed by the Petitioners to a trustee for the benefit of the Respondents to secure and make certain the payment of one certain promissory note dated October 28, 1970, in the principal sum of Two Thousand Nine Hundred Fifty Dollars ($2,950.00) (balance of consideration) due and payable in five monthly installments, four monthly installments of Three Hundred Dollars ($300.00) per said installment and the fifth and last installment being due in the amount of One Thousand Seven Hundred Fifty ($1,750.00) Dollars, bearing interest at eight and one-half (8½) per cent per annum after date until paid in full.

The first and second mortgage transactions were consummated jointly on October 28, 1970. Both the first and

second mortgage notes provided for a simple eight and one-half (8½) per cent per annum interest rate.

The Honorable District Judge properly noted in his Memorandum Opinion (App. p. A-11) that, first, Section 130 of the Act required that any suit based on that section be brought within one year after the occurrence of any "violation" under the Act. The District Court held that the Act itself contemplates that "a violation" occurs at the moment a loan transaction is consummated; accordingly, that the limitation of 15 U.S.C. § 1640 (e) commences to run at that moment. (App. p. A-11) The District Court properly held that the Complaint was therefore barred by the one year limitation imposed by Section 130 and dismissed the suit at the cost of the plaintiffs. (App. p. A-12)

The United States Court of Appeals for the Sixth Circuit properly affirmed the judgment of the District Court and in so doing stated:

> "The Act does not define the term (when) 'the credit is extended,' prior to which time it requires disclosures to be made. However, Regulation Z, § 226.2 (cc) is helpful in this respect. It reads as follows:
>
> (cc) A transaction shall be considered consummated at the time a contractual relationship is created between a creditor and a customer irrespective of the time of performance of either party.
>
> It thus appears that a credit transaction which requires disclosures under the Act is completed when the lender and borrower contract for the extension of credit. The disclosures must be made sometime before this event occurs. If the disclosures are not made, this violation of the Act occurs, at the latest, when the parties perform their contract." (App. p. A-7)

ARGUMENT

The Respondents respectfully submit that the defense to the action brought in the District Court was based on Section 130 (15 U.S.C., § 1640e), which provides as follows:

> "(e) Any action under this section may be brought in any United States district Court, or in any other court of competent jurisdiction, within one year from the date of **the occurrence of the violation.**" 15 U.S.C., § 1640. (Emphasis added.)

It is undisputed that the consumer credit involved in this litigation was extended on October 28, 1970, and that this action was commenced on April 25, 1972, which is obviously one year five months and 28 days after the alleged violation of the Truth-in-Lending Act. The Act itself contemplates that "a violation" occurs at the moment a loan transaction is consummated; accordingly, that the limitation of 15 U.S.C., § 1640(e), commences to run at that moment. As has been observed:

> • • • The Act requires that "each creditor shall disclose clearly and conspicuously, in accordance with the regulations of the Board, to each person to whom consumer credit is extended and upon whom a finance charge is or may be imposed, the information required under this part." 15 U.S.C., § 1631(a). For failure in connection with any consumer credit transaction to disclose to any person information required by 15 U.S.C., § 1638(a), the Truth-in-Lending Act imposes on such creditor civil liability, 15 U.S.C., § 1640 • • • **Mourning v. Family Publications Service, Inc.**, C.A. 5th (1971), 499 F. (2d) 235, 240.

It is inconceivable to the writer that any other interpretation of the Act, "the occurrence of the violation," could have occurred other than when such loan transaction was consummated, namely October 28, 1970.

Section 121 of the Act (15 U.S.C., § 1631) provides:

> "(a) Each creditor shall disclose clearly and conspicuously, in accordance with the regulations of the Board, to each person to whom consumer credit is extended and upon whom a finance charge is or may be imposed, the information required under this part."

It is clear that the creditor must disclose to the consumer at the time consumer credit is extended and thus the Act clearly establishes the time that the requirement is to be met.

It is conceded by the writer that Congress in the formulation of the Truth-in-Lending Act intended to protect the less sophisticated consumer but it is respectfully submitted that Congress placed a limitation of one year from the date of the violation for a consumer to act in order that irreparable harm would not come to a lender such as has occurred in the case at bar. In order for the lender to be also protected a suit should be brought strictly within the time and within the manner prescribed by statute. It was expressed in **Yuri Yajima v. U. S.**, D.C. N.Y. 1946, 6 F.R.D. 260, that the court is powerless to extend the time prescribed by statute.

Buford v. American Finance Company, 333 F. Supp. 1243 (1971), clearly acknowledges (at page 1252) that a claim under the Truth-in-Lending Act must be brought within one year of the alleged violation. The court in **Buford v. American Finance Company**, supra, did not in any way extend the one year statute of limitation but simply held that the members of the proposed class who had relied upon the maintenance of the class action and could prove that reliance would be sufficient to toll the statute of limitation.

The avowed purpose of the disclosure provisions of the Truth-in-Lending Act is:

"... to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit." 15 U.S.C. § 1601; **Buford v. American Finance Company**, 333 F. Supp. 1243 at page 1245.

The credit terms of this consumer credit was a simple interest rate of eight and one-half (8½) per cent, which can only be expressed in simple and clear terms. The petitioners do not complain about the lack of knowledge of credit terms but simply complain about not having been advised that they had the right to rescind under the statute. Hypothetically, if the petitioners' contentions be the law then there could be a 30 year mortgage note executed, the creditor could pay on the note for 25 years and if there was no disclosure of the right to rescind he could at the end of the 25 years rescind the contract, be reimbursed for his full finance charges and all along would have lived in the residence for 25 years. Such an inequitable situation should not exist and it is clear that it was the intent of Congress that such inequities not become realities and thusly enacted a one year statute of limitation to commence to run the moment the loan transaction was consummated.

SUMMARY

Respondents respectfully submit that the ruling of the District Court and the action affirming the District Court by the United States Court of Appeals for the Sixth Circuit in dismissing the complaint in this cause based on Section 130 of the Truth-in-Lending Act (15 U.S.C. § 1640), was proper and the Writ of Certiorari should be denied.

Respectfully submitted

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